United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2598

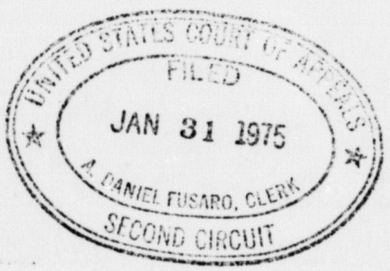
To be argued by
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- DANIEL REID and THEODORE E. THOMAS, JR., Appellants.	Docket No. 74-2598

BRIEF FOR APPELLANT
THEODORE E. THOMAS, JR.

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
THEODORE E. THOMAS, JR.
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

E. THOMAS BOYLE,
Of Counsel

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- DANIEL REID and THEODORE E. THOMAS, JR., Appellants.	Docket No. 74-2598

BRIEF FOR APPELLANT THEODORE E. THOMAS, JR.

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether Count Two must be dismissed, since 18 U.S.C. §2114 applies only to persons and property related to the Postal Service.

2. Whether Agent Shea was engaged in the performance of his official duties when he intervened during the commission of the crime.

3. Whether the District Judge improperly charged the jury that a finding of guilty on Count Three could be predicated on conviction under Count Two, Four, or Five, and improperly charged on an essential element of the crime.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable William C. Conner) rendered on December 5, 1974, after a trial by jury, convicting appellants Reid and Thomas of assaulting a Federal officer (18 U.S.C. §111) (Count One); robbery of mail matter, money, or other property of the United States (18 U.S.C. §2114) (Count Two); unlawful use of a firearm in the commission of a Federal felony (18 U.S.C. §924(c)) (Count Three); robbery of property of the United States (18 U.S.C. §2112) (Count Four); transportation of a stolen firearm in interstate commerce (18 U.S.C. §§922(i), 914(a)) (Count Six); and transportation of a stolen vehicle in interstate commerce (18 U.S.C. §2312) (Count Seven). Appellant Thomas was sentenced to a term of imprisonment for eight years on Count One, twenty-five years on Count Two, eight years on Count Three, three years on Count Four, two years on Count Six, and two years on Count Seven, all to run concurrently.

This Court granted leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

The seven-count superseding indictment* charges appellants Reid and Thomas with the assault of Agent Shea, a special agent of the Drug Enforcement Administration; the robbery of Shea's revolver (two counts); the theft of Agent Shea's revolver;** the use of a firearm in the commission of a felony; and the unlawful transportation in interstate commerce of Agent Shea's revolver and the stoeln vehicle in which they were arrested.

These charges stem from the holdup of a liquor store in the Riverdale section of the Bronx on August 1, 1974. At approximately 4:00 p.m. that day appellants are alleged to have entered the Mosholu Liquor Store at 5705 Mosholu Avenue and to have held up owner John McArdle. During the course of this robbery Agent Shea, a member of the Drug Enforcement Administration, was in a barber shop next door, getting a haircut. Hearing the commotion next door, Agent Shea ran into the liquor store with his gun drawn. Once inside the store, however, Shea was disarmed by appellant Thomas and ordered to lie down on the floor. A short time after Agent Shea lay down on the floor, Thomas fired a shot from Shea's revolver, wounding Shea in the right forearm. Appellant Thomas thereafter fled from the store in a car which was later that day discovered abandoned near a garage on 128th Street in New York. Reid and Thomas were apprehended three days later in Ohio in a stolen car bearing New

---

*The indictment is "B" to appellant's separate appendix.

**Charged in Count Five, on which appellants were acquitted.

York license plates. In appellants' possession at the time of their arrest were Agent Shea's revolver and a .22-calibre automatic air pistol.

A. The Government's Case

Agent Shea testified that while on duty on August 1, 1974, at approximately 4:00 p.m., during a late "lunch period" (62*) he was getting a haircut when he heard a commotion coming from the liquor store next door to the barber shop (61-63). Shea ran next door to investigate.** Before entering the liquor store, he took out his Federal shield and drew his Government-issued revolver *73, 93). Upon entering the liquor store he observed appellant Reid bending over a man*** and striking him over the head with a broken liquor bottle (63-67, 86). He next observed appellant Thomas**** standing in the rear of the store (67). He immediately directed appellants to "freeze" (67), and

---

*Numerals in parentheses, unless otherwise indicated, refer to pages of the trial transcript dated October 22, 23, 24, 25, 28, 29, 1974.

**Defense counsel stipulated, without conceding identification, that at the time Agent Shea entered the liquor store a felony was being committed on the store owner (14[illegible]-147).

***This man was later identified as John McArdle, proprietor of the liquor store.

****Agent Shea testified that appellant Thomas appeared to be "bewildered and confused" at this time (67). Despite Shea's directive to the contrary, appellant Thomas continued to approach Shea.

identified himself as "police."* While Agent Shea's attention was diverted back to Reid, however, appellant Thomas managed to come up on Shea's right rear side (68). Thomas then directed Shea to hand over his gun. Shea testified that when he turned he saw Thomas pointing a "long-barreled automatic[**] to his [Shea's] right side" (68). Thereafter Thomas reached across and took Shea's revolver and shield, and directed Shea to get down onto the floor (68). While Shea was lying on the floor, Thomas fired a shot from Shea's revolver, striking Shea in the right forearm (69).

Seconds later, Reid and Thomas fled from the liquor store and got into a maroon-colored 1973 Buick station wagon which was parked on the same side of the street and approximately four car lengths away from the liquor store. The getaway car collided with a parked car on the other side of the street and then sped off. Agent Shea gave chase, but was unable to follow them*** (72-74).

---

*Agent Shea acknowledged that he never identified himself as a Federal officer (88).

**According to the confession of appellant Thomas, which the Government elected not to introduce at trial although the Court had ruled it admissible, the .22-calibre automatic air pistol found in the satchel behind the rear car seat at the time of appellants' arrest was the same weapon Thomas had used to disarm Agent Shea in the liquor store.

***Thereafter Agent Shea drove to the hospital for treatment of his gunshot wound. According to Shea's testimony, the bullet shattered 80% of the radial bone of his right forearm (73-74).

To support its contention that Agent Shea was "engaged in ... the performance of his official duties" at the time, as required by 18 U.S.C. §111, a copy of the Agent's Manual issued to all agents of the Drug Enforcement Administration* was introduced by the Government over defense objection (49-50). The manual, written by the administrator of the Drug Enforcement Administration, states, inter alia:

> ... Should an agent happen to witness a state violation whether he is on or off duty, the administrator expects him to take reasonable action as a law enforcement officer to prevent the crime and/or apprehend the violator. This policy applies only to felonies or violent misdemeanors, and does not apply to traffic violations or other minor offenses.
>
> (49). Emphasis added.

Defense counsel strenuously objected to the introduction of this document on the grounds that it did not define the "official duties" of a Federal agent of the Drug Enforcement Administration (47-48). The court below ruled that this objection went to the weight rather than to the admissibility of the evidence, and further stated that the defense had not established "to my satisfaction that as a matter of law, these guidelines or instructions do not define the course of duty of Drug Enforcement Administration Agents" (49).

---

*On cross-examination, Agent Shea testified that he did not know whether this provision was included in the manual when it was issued to him or was part of a supplement issued at a later date (110).

Although Agent Shea testified that he had been working on a case that day in the Riverdale section of the Bronx (119), this was never substantiated by other evidence. To the contrary, at the end of the Government's case, the Government represented that although it had conducted a search for reports, records, and/or logs of the Drug Enforcement Administration which would support Shea's contention that he was working on August 1, 1974, it could not find such records* (136-137, 504).

The Government introduced proof** to show that the car in which appellants fled was later found abandoned in a lot at 244 East 128th Street in New York (236-237), and also that a pair of glasses found inside the liquor store following the robbery (170, 264) matched the prescription and make of eyeglasses issued to appellant Thomas several years earlier (275-283).

Appellants were arrested three days later, on August 4, 1974, in Ohio, after a chase by Ohio State Trooper Boland. They were driving a 1972 white Pontiac Grand Prix, which had been

---

*The Court had earlier informed the Government that any such report would constitute 3500 material which the Government was obliged to turn over to the defense (136).

**Paint scrapings matched those taken from the parked car appellants' vehicle struck when they were fleeing from the liquor store (165, 311-317). In addition, the Government showed that fingerprints in the car matched those of appellant Thomas (248-249, 289-291), and that a bottle of wine with the liquor store label on it was found in the vicinity of the abandoned Buick station wagon (241, 257).

reported stolen in New York City on July 29, 1974* (404-407). Also discovered in the car was Agent Shea's revolver, a .38-calibre Smith and Wesson,** as well as a .22-calibre Smith and Wesson air pistol.

At the end of the Government's case, defense counsel moved to dismiss the charge of assault on a Federal officer (Count One) (18 U.S.C. §111), upon the Government's failure to show that Shea was acting in the performance of his official duties as a Federal officer at the time of the alleged assault, and moved to dismiss Count Two on the grounds that 18 U.S.C. §2114 was intended to apply only to robberies related to the Postal Service (498-499). All defense motions were denied (498-499).

Appellant Thomas rested without calling any witnesses (493).

On summation, the Assistant United States Attorney made the following comments concerning whether Agent Shea was engaged in his "official duties" as a Federal officer at the time of the

---

*To show knowledge that the vehicle was stolen, the Government introduced testimony from a garage attendant who, although unable positively to identify appellant Thomas, identified appellant Reid as one of two men who came into his garage on July 29, 1974, and stole the car in which appellants were arrested on August 4 (322-323, 386-391).

**The car in which appellants were driving in Ohio finally came to a stop after hitting another car and rolling down an embankment. Trooper Boland testified that he approached the driver of the car, appellant Reid, who stated that the passenger, appellant Thomas, was going to shoot himself. Boland told them that whatever the passenger was going to use to shoot himself should be thrown out the driver's window. Thereafter, Shea's revolver was thrown from the driver's window. The air pistol was found in a satchel in the rear seat behind the passenger seat (410, 415-419).

assault alleged in Count One:

> ... The evidence, the issue that you are faced with, is whether Agent Shea was assaulted, whether Agent Shea when he was assaulted was acting as a police officer.
> ...
>
> * * *
>
> ... The question is when Mr. Shea was trying to stop that savage bottle beating was Mr. Shea acting as a police officer? The regulations of Government's Exhibit #2 in evidence, I would submit, as Mr. Wohl has already stated, Agent Shea was acting in the finest tradition of a law enforcement official when he went into that liquor store and tried to stop that savage goings on.
>
> (563; 564). Emphasis added.

B. The Charge to the Jury*

As to Count One, assault on a Federal officer, 18 U.S.C. §111, the District Judge instructed the jury that the Government must show that Agent Shea was engaged in the performance of his "official duties" at the time of the assault (596). As to this element, however, the Court more specifically charged:

> You will note also that in listing the elements that must be proven, one was the fact that at the time of the alleged assault Shea was an employee of the Drug Enforcement Administration engaged in the performance of his official duties. Section 6641.5 of the Drug Enforcement Administrative Agents' Manual reads in pertinent part:
>
> "Should an agent happen to witness a state violation, whether he is on or off duty, the administrator of the Drug Enforcement Administration expects him to take reasonable action as a law enforcement officer to prevent the crime and/or apprehend the

*The entire charge is "C" to appellant's separate appendix.

violator. This policy applies only to felonies or violent misdemeanors."

* * *

What you must determine is whether or not in entering the liquor store and attempting to interrupt the performance of the felony or violent misdemeanor which he observed taking place at that time he was acting within the scope of his official duties. In determining this you should consider the special agents manual which I read to you. You should also consider whether or not Shea was acting within the scope of the instructions given in the manual. I instruct you that as a matter of law if Agent Shea was engaged in a personal frolic, if he was acting purely as a private citizen, then he was not engaged in the scope of his official duties at the time he entered the liquor store.

I further charge you that it is not necessary that either defendant know the identity of Shea or know that Shea was a federal officer or that he was engaged at the time in the performance of his official duties....

(596; 597-598).

As to Count Two, involving appellant Thomas' robbery of Agent Shea's revolver, in violation of 18 U.S.C. §2114, the Court failed to charge, as appellant Thomas had contended from the outset of the trial (6-7), that the property stolen must be related to the use of the mails or the Postal Service (603).

As to Count Three, the "unlawful use of a firearm to commit" a Federal felony (18 U.S.C. §924(c)), the Court instructed the jury:

Now, let us look at the elements which the Government must prove beyond a reasonable doubt to secure a conviction of either

defendant on Count 3.

First, that the defendant Thomas used a firearm during the course of the assault charged in the first count or during the robbery and assault charged in the third [sic*] count or during the robbery of Shea's Government-issued revolver charged in the fourth count or during the stealing of Shea's revolver as charged in the fifth count. Therefore, if you find the defendants not guilty on the first, second, fourth, and fifth counts, you must necessarily find them not guilty on this count, the third count, because this count involves the use of a gun in committing a crime such as is charged in the other of the first five counts. So, if you find the defendants not guilty as to the other counts, you must find the defendants not guilty as to the third count.

If, however, you find either defendant guilty on the first or the second or the fourth or the fifth count, then you must consider the third count, because each of the offenses charged in the first, second, fourth and fifth counts are crimes which may be prosecuted in a Federal Court.

So the first additional element that you must consider in ruling on the third count is whether the defendant used a firearm in connection with the offense charged in one of the other counts.

A firearm is defined as any weapon which is designed to expel a projectile by the action of an explosive. You must decide whether either defendant knew that he was using a firearm, and that he was not using it as a result of carelessness, negligence or because of some other innocent reason. And you must further find beyond a reasonable doubt that the defendant in question was using the firearm to commit one of the other felonies charged in Counts 1, 2, 4 or 5.

---

*The Court here meant to refer to Count Two, which charged a violation of 18 U.S.C. §2114.

> The Government charges here that the defendant Thomas used a firearm, in fact that he used two firearms. First the firearm with which he held up Agent Shea, and after he had taken Agent Shea's weapon away from him, he also used Agent Shea's weapon. In both instances it is the defendant Thomas who is charged with using a firearm.
>
> (608-610). Emphasis added.

In a supplemental instruction, the District Judge modified his original reference to "two firearms," and correctly instructed the jury that only Agent Shea's revolver constituted a "firearm" within the meaning of 18 U.S.C. §924(c):

> Now, we have here several weapons about which there has been testimony, and at least two of the weapons are in evidence. We have, for example, Agent Shea's gun. I have instructed you as a matter of law that that is a firearm within the definition of the Federal Criminal Code.
>
> We have also in evidence the CO_2 actuated pistol, automatic pistol, which was found in the automobile which was stopped in Ohio. I am instructing you as a matter of law that the CO_2 actuated automatic pistol is not a firearm because it is not powered by explosive charges. However, I do instruct you as a matter of law that it is a dangerous weapon.
>
> So you will have to look to the counts of the indictment which I am going to hand to you on agreement of counsel, and as to those charges or counts which involve the firearm, you must find that the revolver of Agent Shea was involved.
>
> For example, if you are talking about theft of a firearm, then it would be the theft of Agent Shea's gun. If you are talking about use of a firearm, then it must have been Agent Shea's gun that was used after it was taken away from him by the defendant in question, if you find that it was in fact taken away

from him by the particular defendant.

(647-648). Emphasis added.

After two days' deliberation, the jury convicted appellants on Counts One, Two, Three, Four, Six, and Seven. Both defendants were acquitted on Count Five, conversion of United States property valued in excess of $100, i.e., Shea's revolver.

The District Court imposed the following concurrent sentences upon appellant Thomas:

Count One	-	Eight years
Count Two	-	Twenty-five years
Count Three	-	Eight years
Count Four	-	Three years
Count Six	-	Two years
Count Seven	-	Two years

On this appeal, appellant Thomas challenges his conviction on Counts One (18 U.S.C. §111), Two (18 U.S.C. §2114), and Three (18 U.S.C. §924(c)), on which he was sentenced to concurrent sentences of eight years, twenty-five years, and eight years, respectively. As to the convictions for Counts Four (18 U.S.C. §2112), Six (18 U.S.C. §922(i)), and Seven (18 U.S.C. §2312), on which he received concurrent sentences of three years, two years, and two years, respectively, appellant Thomas does not take issue.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §111. Assaulting, resisting, or impeding certain officers or employees

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. §924. Penalties

...

(c) Whoever --

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States ...

...

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

18 U.S.C. §2114. Mail, money or other property of the United States.

Whoever assaults any person, having lawful charge, control, or custody of any mail matter or of any money or other property of the United States with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

ARGUMENT

Point I

COUNT TWO, WHICH CHARGES THE ASSAULT ON AGENT SHEA WITH INTENT TO STEAL HIS REVOLVER UNDER 18 U.S.C. §2114, MUST BE DISMISSED, SINCE THAT SECTION APPLIES ONLY TO PERSONS AND PROPERTY RELATED TO THE POSTAL SERVICE.

Agent Shea, a member of the Drug Enforcement Administration, attempted to intervene during the commission of a holdup of a liquor store. At the time of the robbery he was next door in a barber shop getting a haircut. Upon hearing the commotion, he ran next door to the liquor store with his Government-issued revolver drawn. Inside the liquor store appellant Thomas, at gunpoint, took Shea's revolver from him.

This conduct does not constitute an offense under 18 U.S.C. §2114,* since the robbery involving Shea's gun was totally unrelated to property in the possession or under the control of the Postal Service. Accordingly, Count Two must be dismissed.

---

*18 U.S.C. §2114 provides:

> Whoever assaults any person, having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

United States v. Fernandez, 497 F.2d 730 (9th Cir. 1974).

The facts here are similar to those in the Fernandez case, the only case in which a court of appeals has considered this issue. As here, the victim there was a Drug Enforcement Administration agent; however, unlike the present case, the property stolen in Fernandez was Government money used to purchase narcotics. For purposes of this issue, however, the cases are virtually identical.

While 18 U.S.C. §2114 refers to "any person, having lawful charge, control, or custody of any mail matter or of any money or other property of the United States," the predecessor of this section referred only to assaults and robberies related to the Postal Service:

> Whoever shall assault any person having lawful charge, control or custody of any mail matter, with intent to rob, steal, or purloin such mail matter or any part thereof, or shall rob any person of such mail or any part thereof, shall, for a first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery, he shall wound the person having custody of the mail, or put his life in jeopardy by use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.
>
> The Act of March 4, 1909, Ch. 321, §197, Stat. 1126. Emphasis added.

Whereas the original wording referred only to "mail matter" and "person having custody of mail matter," this section was amended in 1935, when the terms "money" and "other property"

were added.*

It being unclear whether Congress intended to broaden the scope of the statute to include property of the Postal Service other than the mail itself, the Ninth Circuit, in United States v. Fernandez, supra, applied the fundamental rule of statutory construction where a statute appears to be ambiguous (United States v. Bass, 404 U.S. 436 (1971)), and looked to Congressional intent as reflected in the legislative history. In the words of the Ninth Circuit in Fernandez, "the Congressional discussion is as illuminating as legislative history could possibly be:"

> The only purpose of the pending bill is to extend the protection of the present law to property of the United States in the custody of its postal officials, the same as it now extends that protection to mail matter in the custody of postal officials. Aside from that, it makes no change in the law. It just includes property of the United States

---

*The Act of August 26, 1936, Ch. 694, 49 Stat. 867, in comparison, read:

> Whoever shall assault any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or any part thereof, or shall rob any such person of such mail matter, or of any money, or any part thereof, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of such mail, money, or other property of the United States, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty five years.

> in addition to mail matter which is protected; and let me say there are many custodians of postal stations who have a great amount of money in their custody but little mail; for instance, in those substations where money orders are sold. If a bandit attacks these employees seeking that money, there is no way to prosecute the bandit under the present law, but if he is merely after a postal card or a letter he can be prosecuted.
>
> United States v. Fernandez, supra, 497 F.2d at 740, quoting from 79 Cong. Red. 8025 (1935). Emphasis by the Court.

It is clear from the record below* that the District Court was unaware of the Fernandez decision, and relied instead on United States v. O'Neil, 436 F.2d 471 (9th Cir. 1970), which Fernandez overruled.** The other case upon which the District Court relied was United States v. Ismael Rivera, a/k/a Pequilino, 74 Cr. 280 (S.D.N.Y.) (Wyatt, D.J.) which, at the time, had not been appealed. The appeal in United States v. Ismael Rivera, a/k/a Pequilino, Doc. No. 74-2115, was heard by a panel of this Court on January 14, 1975, at which time the Court reserved decision. What is significant, however, is that the issue here -- whether 18 U.S.C. §2114 encompasses a robbery unrelated to the Postal Service -- was never raised in the Rivera

---

* [THE COURT:] ... [N]o court of appeals has ruled on the applicability of Section 2114 on a case of this type....

(503).

**As the Fernandez opinion notes, however, this issue was never raised on O'Neill. United States v. Fernandez, supra, 497 F.2d at 739.

case. It therefore has little, if any, precedential value in this Court.

Since the legislative history definitely states that the 1935 amendment was not intended to broaden the scope of the statute beyond persons and property* related to the Postal Service, the charge under Count Two of the indictment must be dismissed.

---

*The Government's interpretation of this amendment -- that it was intended to apply to the robbery of all Government-owned property regardless of its relation to the Postal Service -- would have rendered 18 U.S.C. §2112 obsolete, and thereby necessitated its repeal. Obviously 18 U.S.C. §2112, which is the violation for which appellant was convicted in Count Four of the indictment, has never been repealed. To the contrary, it is in constant use to prosecute offenses involving the theft of Government property unrelated to the Postal Service.

Point II

AGENT SHEA WAS NOT "ENGAGED IN ... THE PERFORMANCE OF HIS OFFICIAL DUTIES" WITHIN THE MEANING OF 18 U.S.C. §111 WHEN HE ENTERED THE LIQUOR STORE TO INTERVENE DURING THE COMMISSION OF THE ROBBERY.

The record reflects that while getting a haircut on his lunch hour Agent Shea, a member of the Drug Enforcement Administration, heard a commotion in the liquor store next door and ran in to see if anything was wrong. Seeing a robbery in progress, Agent Shea drew his revolver and attempted to apprehend the robbers. However, appellant Thomas subsequently disarmed Agent Shea and shot him in the right forearm with his own gun.

To establish that Agent Shea was "engaged in the performance of his official duties" at the time of the assault, 18 U.S.C. §111, the Government relied exclusively on Section 6641.5 of the Agent's Manual issued by the Drug Enforcement Administration. That section states:

> ... Should an agent happen to witness a state violation whether he is on or off duty, the administrator expects him to take reasonable action as a law enforcement officer to prevent the crime and/or apprehend the violator. This policy applies only to felonies or violent misdemeanors, and does not apply to traffic violations or other minor offenses.
>
> 84 Agents Manual, June 25, 1974, §6641.5.

The Government's proof fails to establish that at the time of the assault Agent Shea was engaging in the performance of his "official duties" as a member of the Drug Enforcement Adminis-

tration, and accordingly Count One of the indictment must be dis. issed. United States v. Cho Po Sun, 409 F.2d 489 (2d Cir. 1969); United States v. Heliczer, 373 F.2d 241, 245 (2d Cir. 1967); Amaya v. United States, 247 F.2d 947 (9th Cir. 1957).

It is clear from the language which the Agents' Manual employs that this provision was intended only as a guideline to future conduct rather than as a definition of official duties, e.g., "should an agent happen to witness a ... violation" or "the administrator expects" (emphasis added). Moreover, the directive expressly states that this conduct is "expected" of the agent in his capacity "as a law enforcement officer"* rather than as a Federal agent or an agent of the Drug Enforcement Administration.** The following paragraph of the Manual further confirms that, by encouraging an agent to intervene in state crimes committed in his presence, the administrator was referring to an agent's personal responsibilities rather than to an official function. This paragraph of the Agents Manual states:

---

*As is evident from his remarks on summation, the Assistant U.S. Attorney was laboring under the mistaken belief that the issue was whether Shea, "when he was assaulted[,] was acting as a police officer...." (563).

**This is in sharp contrast to the preceding paragraph in the manual, which states:

> ... Should an agent happen to witness a Federal violation (whether he is on or off duty) the Administrator expect him to take reasonable action as a Federal enforcement officer to prevent the crime and/or apprehend the violator....
>
> Emphasis added.

> ... Unless specifically authorized as a peace officer under state law, the agent's authority in these situations is that of an ordinary citizen.
>
> 84 Agents Manual, June 25, 1974, §6641.5).

Under the law of New York, a Federal officer is not considered a "peace officer" or a "police officer," N.Y.C.P.L. §1.20(33), and therefore it is clear that in New York a Federal agent is acting as "an ordinary citizen" when he interferes and makes such an arrest. United States v. Viale, 312 F.2d 595 (2d Cir. 1963).

The Code of Federal Regulations makes explicit what the Drug Enforcement Administration's official responsibilities are. 28 C.F.R. §§0.100-0.104.

> §0.101. Specific functions.
>
> Subject to the general supervision of the Attorney General, and under the direction of the Deputy Attorney General, the Administrator shall be responsible for:
>
> (a) The development and implementation of a concentrated program throughout the Federal Government for the enforcement of Federal drug laws and for cooperation with State and local governments in the enforcement of their drug abuse laws.
>
> (b) The development and maintenance of a National Narcotics Intelligence System in cooperation with Federal, State, and local officials, and the provision of narcotics intelligence to any Federal, State, or local official that the Administrator determines has a legitimate official need to have access to such intelligence.

While these functions are wide in scope and involve cooperation with State and local governments in enforcing drug

laws, it is clear that the Drug Enforcement Administration's responsibilities relate solely and exclusively to the area of drugs, and therefore would not encompass Agent Shea's conduct under the circumstances presented here. Cf. United States v. Tijernia, 407 F.2d 349, 353 (10th Cir. 1969).

Moreover, this interpretation of 18 U.S.C. §111 is consistent with the legislative intent, which was "to further the legitimate purposes of the Federal Government," Ladner v. United States, 358 U.S. 169, 175 (1958) (quoting from a letter of January 3, 1934, to Senator Ashurst, Chairman of the Senate Committee on the Judiciary, from Homer Cummings, Attorney General). Recognizing this clear Congressional intent, the Court, in United States v. Ladner, supra, 318 U.S. at 175-176, stated:

> ... [T]he Congressional aim was to prevent hindrance to the execution of official duty, and thus to assure the carrying out of Federal purposes and interests, and was not to protect Federal officers except as incident to that aim.

This Court has defined the "official duties" requirement of 18 U.S.C. §111 in similar terms:

> ... Engaged in ... performance of official duties is simply acting within the scope of what the agent is employed to do.[*]
>
> United States v. Heliczer, supra, 373 F.2d at 245. Emphasis added.

---

*Although appellant Thomas most strenuously urges that the Government failed to show that the assault occurred while Agent Shea was performing his official duties as a Drug Enforcement Administration agent, assuming arguendo that he was so engaged, this Court must still reverse the conviction because of the

See also United States v. Cho Po Sun, supra; Amaya v. United States, supra.

Since an agent is "expected" to intervene, whether on or off duty at the time, it is clear that this is not what he is "employed to do." It is further clear that while Agent Shea's conduct was, as the Government stated on summation, "in the finest tradition of a law enforcement official" (564), it was not in the furtherance of "Federal purposes and interests," as required by 18 U.S.C. §111. United States v. Ladner, supra, 318 U.S. at 175.

The reliance below by the Government and the Court on such cases as United States v. Heliczer, supra, and United States v. Martinez, 465 F.2d 79 (2d Cir. 1972), is completely misplaced, because in those situations the Federal agent was clearly doing

---

[Footnote continued]

improper jury instruction on this issue:

> ... In determining [the scope of Shea's official duties,] you should consider the special agent's manual which I read to you. You should also consider whether or not Shea was acting within the scope of the instructions given in that manual.

Since the proper test is whether Shea was doing what he was "employed to do" rather than what the Manual -- which is only a guideline in this instance for personal responsibility -- directed, the instruction is a misconstruction of the only disputed element of the crime. As such, it should be noted as plain error.

what he was "employed to do," i.e., acting in furtherance of his Federal duties to arrest for violation of Federal law. United States v. Dickerson, Doc. No. 74-1914, slip opinion 1115 (2d Cir., January 16, 1975); United States v. Alsondo, 486 F.2d 1339 (2d Cir. 1973), cert. granted sub nom. United States v. Feola, 42 U.S.L.W. 3504 (April 14, 1974); United States v. Ulan, 421 F.2d 787 (2d Cir. 1970); United States v. Montanaro, 362 F.2d 527 (2d Cir. 1966); United States v. Lombardozzi, 335 F.2d 414 (2d Cir. 1964).

Thus, while the Drug Enforcement Administration's administrator's "policy" to encourage involvement in the apprehension of persons committing state felonies or misdemeanors involving violence is a commendable one, the offense being a non-drug related state offense is clearly outside the ambit of Agent Shea's official duties as a member of the Drug Enforcement Administration, and therefore, since Agent Shea was attempting to arrest appellants in the commission of a state offense, it is the State which will protect Agent Shea's interests, as indeed it has done in this case.*

---

*The indictment returned in the Bronx County Supreme Court (annexed as "D" to appellant's separate appendix) reflects that the same acts which form the basis for the charge under 18 U.S.C. §111 are also the basis of a charge of attempted murder and first degree robbery.

Point III

THE COURT IMPROPERLY INSTRUCTED THE JURORS (A) THAT A FINDING OF GUILT AS TO COUNT THREE (USE OF A FIREARM TO COMMIT A FEDERAL FELONY, 18 U.S.C. *924 (c)(1)) COULD BE PREDICATED ON A CONVICTION UNDER COUNT TWO, FOUR, OR FIVE, AND (B) IMPROPERLY CHARGED ON AN ESSENTIAL ELEMENT OF THE CRIME.

The record reflects that appellant Thomas took Agent Shea's Government-issued revolver by coming up behind him and pointing an automatic pistol in his side, thus committing a robbery. An automatic pistol was recovered in the possession of appellants at the time of their arrest in Ohio, having been discovered in a satchel behind the passenger's seat where appellant Thomas had been sitting. Subsequent ballistics examination of this weapon disclosed that it was a .22-calibre automatic CO_2 pistol (commonly referred to as an "air" pistol). At the trial, the Government introduced into evidence the air pistol and Agent Shea's revolver, both of which were in appellants' possession at the time of their arrest. Although Agent Shea never identified the air pistol as the weapon used to hold him up, it matched Shea's description of the weapon as an "automatic" pistol. While never expressly stated, it was presumed that the air pistol was introduced into evidence on the theory that it was the actual weapon appellant Thomas used to disarm Shea and remove his revolver.* While the Government later theorized

---

*The confession of appellant Thomas states, inter alia, that the air pistol found in the satchel at the time of the

that Thomas used two firearms, Agent Shea's and some other weapon, the Court did not accept this contention, and instructed the jurors that to convict under Count Three, they must find that the "firearm" used by appellant Thomas to commit a Federal felony was the revolver belonging to Agent Shea.* The Court further instructed the jurors that since the air pistol which the Government introduced was CO_2-activated, it did not constitute a "firearm" within the meaning of 18 U.S.C. §924(c).**

[Footnote continued]

arrest was the same weapon Thomas had used to disarm Agent Shea at the time of the liquor store robbery. The Government never introduced the Thomas confession into evidence, although the Court held it admissible in redacted form.

*"[A]s to those charges or counts which involve the firearm, you must find that the revolver of Agent Shea was involved" (648).

**"We have also in evidence the CO_2 activated pistol, automatic pistol, which was found in the automobile which was stopped in Ohio. I am instructing you as a matter of law that that CO_2 activated pistol is not a firearm because it is not powered by an explosive charge. However, I instruct you as a matter of law that it is a dangerous weapon" (647).

A. The conviction on Count Three could not properly be predicated upon a finding of guilt on Count Two, Four, or Five.

Notwithstanding the proper instructions set forth above, the District Court improperly charged* the jury that a finding of guilt on Count Three (use of a firearm to commit a Federal felony) could be predicated on a conviction under Count One (assault on a federal officer, 18 U.S.C. §111), Count Two (robbery of mail or other government property, 18 U.S.C. §2114), Count Four (theft of personal property of the Government, 18 U.S.C. §2112), or Count Five (theft of government property valued in excess of $100, 18 U.S.C. §641). This instruction was wrong.

While it was possible for the jury to find that Agent Shea's gun was used "to commit" the assault alleged in Count One, it was impossible properly to find that Agent Shea's revolver was used "to commit" the theft of Agent Shea's revolver, which is the property belonging to the Government described in

---

*"Therefore, if you find the defendants not guilty on the first, second, fourth, and fifth counts, you must necessarily find them not guilty on this count, the third count.... So, if you find the defendants not guilty as to the other counts, you must find the defendants not guilty as to the third count.

"If, however, you find either defendant guilty on the first or the second or the fourth or fifth count, then you must consider the third count, because each of the offenses charged in the first, second, fourth and fifth counts are crimes which may be prosecuted in a federal court."

(608-609).

Counts Two and Four.* By definition, the crime of robbery consists of the unlawful taking of property from the person of another by the use, or threatened use, of force or violence. United States v. Howard, Doc. No. 74-1282, slip opinion 405 (2d Cir., November 15, 1974). The robbery is completed at the moment the "assailant acquires complete possession and control of the property." Clark and Marshall, CRIMES, 886 (7th ed. 1967). The record reflects, and the jury could only have found, that the theft of Shea's revolver was accomplished through appellant Thomas' threatened use of the .22-calibre air pistol, which clearly was not a "firearm."

While the jury could properly have predicated its verdict under Count Three on the Federal assault charged in Count One, this would be purely speculative since there is no way of determining on which theory the jury convicted. The law is clear that where guilt is premised on alternative theories, the invalidity of any one theory mandates reversal. United States

---

*Since the jury acquitted appellants as to Count Five -- the theft of government property (Agent Shea's revolver) valued in excess of $100 (18 U.S.C. §641) -- this clearly cannot be the Federal felony on which appellants' conviction on Count Three is predicated. However, the same reasoning would apply, since appellant Thomas clearly could not use Shea's revolver to "commit" the theft of Shea's revolver.

v. Leary, 395 U.S. 6, 31, 32 (1969); United States v. Dickerson, supra;* United States v. Rodriguez, 465 F.2d 5, 10 (2d Cir. 1972).

B. The Court improperly charged the jury on the elements of the crime charged in Count Three.

This Court should reverse the conviction under Count Three for still another reason. 18 U.S.C. §924(c)(1) prohibits the "use of a firearm to commit any felony for which he may be prosecuted in a court of the United States." Emphasis added.

Although the District Court read this section to the jury at the beginning of the charge on this count, in his detailed explanation of this offense, the District Judge stated:

> ... So the first additional element that you must consider in ruling on the third count is whether the defendant used a firearm in connection with the offense charged in one of the other counts [i.e., Count One, Two, Four, or Five].
>
> (609). Emphasis added.

By charging that the use of a firearm was sufficient "in connection with," rather than "to commit" a Federal felony, the District Court distorted the elements of the crime. Whereas

---

**For this same reason, if this Court should reverse appellant Thomas' conviction under Count One (assault on a Federal officer, 18 U.S.C. §111) or Count Two (robbery of mail or other peroperty, 18 U.S.C. §2114) as appellant contends in Points I and II, supra, then the conviction under Count Three must be reversed as well since those counts could be the sole basis for the guilty verdict here.

the jury might have found that appellant Thomas gained possession of Shea's revolver "in connection with" the theft of that revolver, it is clear that it was the CO_2 pistol, which was not a "firearm," which Thomas used "to commit" the crimes charged in Counts Two and Four. Although unobjected to below, this constitutes plain error. Screws v. United States, 325 U.S. 91, 101-107 (1945); United States v. Clark, 475 F.2d 240, 248-249 (2d Cir. 1973); United States v. Fields, 466 F.2d 119 (2d Cir. 1972); United States v. Byrd, 353 F.2d 570, 572-574 (2d Cir. 1965).

Point IV

APPELLANT THOMAS JOINS IN THE ARGUMENTS OF APPELLANT REID WHICH ARE NOT INCONSISTENT WITH THE ARGUMENTS RAISED HEREIN.

CONCLUSION

For the reasons stated above, the judgments of conviction on Counts One, Two, and Three should be reversed and dismissed.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
TTHE LEGAL AID SOCIETY,
Attorney for Appellant
THEODORE E. THOMAS, JR.
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007

E. THOMAS BOYLE,
Of Counsel

January 31, 1975

Certificate of Service

1/31/, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

E. Thomas Boyle